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No. 84-849

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

COMMONWEALTH OF KENTUCKY, d/b/a
BUREAU OF STATE POLICE,
Petitioner,

v.

JAMES E. GRAHAM, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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24 pp

QUESTION PRESENTED

Whether Congress intended in the Civil Rights Attorney's Fees Awards Act to authorize a fee award against a state in a section 1983 damages case, where the state was not, and could not have been, held responsible to pay the relief won on the merits.

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The above-named associations hereby move, pursuant to Rules 36 and 42 of this Court's rules, for leave to file the attached brief amicus curiae supporting petitioner in No. 84-849, *Commonwealth of Kentucky v. Graham.* Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has declined to do so.

Movants are organizations whose members include state, county and municipal governments and officials located throughout the United States. The members of each organization are vitally concerned with legal issues affecting the potential financial liabilities of state, county, and municipal governments.

The question presented here involves the obligation of these governments to pay the attorney's fees of prevailing plaintiffs in civil rights damages cases brought against individual governmental employees. In view of the explosion in recent years of civil rights suits under 42 U.S.C. § 1983 and other provisions, the cost of the fee liability at issue here is likely to be quite significant. Movants have an interest in not being forced to shoulder this additional financial load based on what they view as a patently erroneous analysis of congressional intent in enacting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.

But their concern is more than financial. The lawsuits at issue here are damages suits against individual governmental employees. The fee awards that, under the Sixth Circuit rule, would be imposed on states and other governmental bodies would come after such lawsuits have been litigated and/or settled by other parties—*i.e.*, the plaintiff and the individual defendant. In the view of movants, such a separation of fee liability from merits liability creates a significant potential for abuse of the fee-shifting authorized by section 1988.

The attached brief focuses on these concerns. For the reasons stated above, movants ask that their motion be granted.

Respectfully submitted,

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INTEREST OF AMICI

The interest of amici appears from the foregoing motion.

STATEMENT

This case raises an important question concerning the obligation of states (and, by extension, counties and municipalities) to pay the attorney's fees of plaintiffs bringing damages suits against governmental officials under 42 U.S.C. § 1983. It arises from a police brutality case involving state and local officers, in which the plaintiff negotiated a settlement of $60,000 in damages pay-

able by the state police commissioner [1] and two municipalities.[2] This settlement specifically excluded any payment of attorney's fees by the defendants, but authorized the plaintiffs to seek fees from the Commonwealth of Kentucky. Pet. App. 16a. In a subsequent motion, the plaintiffs won an order under 42 U.S.C. § 1988 requiring the state to pay them over $58,000 in fees and over $6,000 in other expenses. On appeal, the Sixth Circuit upheld this award in a short *per curiam* opinion which relied solely on this Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978).

There are several aspects of the proceedings below that require emphasis. First, the only relief ever sought by the plaintiffs was damages; there was no claim for equitable or declaratory relief from any state laws, policies or patterns of conduct. Second, while the Commonwealth of Kentucky was initially named as a defendant, the court never made any finding that the state had in any way authorized the tortious conduct of the individual police defendants. Finally, in such a setting, the court was required to deny all merits relief against the state under the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332 (1979). It recognized this obligation by dismissing the Commonwealth as a defendant almost two years before the settlement by the other parties.

Despite these circumstances, the courts below somehow saw fit to impose fee liability on the Commonwealth of Kentucky. Such a ruling represents a real threat to every state, county or town across the country, because it opens up the possibility of fee awards payable out of public

[1] A number of other individual state police officers were named as defendants. Apparently their share of the liability was represented by the $45,000 settlement with Commissioner Brandenburgh, which was payable, in installments, by him personally and as agent for the "Kentucky State Police Legal Fund." Pet. App. 4a.

[2] The City of Elizabethtown settled for $5,000. Hardin County settled for $10,000.

funds in a wide variety of cases where governmental entities are not even proper parties. As it is without legal basis, this decision must be reversed.

SUMMARY OF ARGUMENT

1. In the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, Congress authorized fee awards only against those parties responsible for the relief on the merits. This is the clear rule in suits against judges. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); *Pulliam v. Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984). There is no reason for a different rule authorizing fee liability on the part of the states in damages cases, where they can never be liable on the merits. Although the court below relied on *Hutto v. Finney*, 437 U.S. 678 (1978), the court erred as that decision only reinforces the principle that fee liability should be tied to merits liability.

2. Even if section 1988 could be read to impose fee liability on governmental entities in some cases where they are not liable on the merits, it could not be so read in a case involving a state. Any imposition of fee liability on states in such a case would constitute an abrogation of the Eleventh Amendment. Such an abrogation must be authorized by Congress in terms far more explicit than those used in section 1988. *Quern v. Jordan*, 440 U.S. 332 (1979).

3. Imposing fee liability on states in cases involving damages claims against their employees would lead predictably to overcompensation of plaintiffs. This is the likely result of the separation of the party liable on the merits from the party liable for fees.

ARGUMENT

The Sixth Circuit, in awarding attorney's fees against a state based upon the liability of an individual officer for damages, was mistaken for several reasons. First, nothing in section 1988 remotely suggests that Congress in-

tended governmental bodies to be liable for fees in cases where they are not liable, directly or indirectly, for the underlying relief. Second, even if, in some cases, section 1988 could be read to allow that result it would still lack the clear intent to abrogate the states' Eleventh Amendment immunity from awards in cases seeking retroactive relief. Finally, the unhinging of liability for fees from liability on the merits would lead to serious and unjustified impositions on state and municipal treasuries.

I. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT DOES NOT AUTHORIZE FEE AWARDS PAYABLE BY STATES IN CASES WHERE INDIVIDUAL OFFICIALS HAVE BEEN HELD LIABLE FOR DAMAGES.

In the view of *amici*, there is no need in this case for the Court to do more than to apply the relevant statute as Congress intended. No plausible interpretation of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, supports the holding that states or municipalities are liable for attorney's fees in cases where they are not liable for the underlying relief.[3] On the contrary, this Court has already recognized, in the context of suits against judges, that the liability of a given entity for a fee award under section 1988 depends on whether that party or entity is validly obligated to provide the merits relief. *See, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980). The sole authority cited by the Sixth Circuit for its erroneous position, *Hutto v. Finney*, 437 U.S. 678 (1978), only reinforces this principle.

[3] We highlight this *statutory* analysis because of its importance for counties and cities that may, in the future, be threatened with fee awards in damages cases involving their employees. Unlike petitioner here, such governmental entities may be unable to claim the shield of the Eleventh Amendment. *See* section II *infra*. But that does not alter the fact that, under section 1988, they cannot be held liable for fees unless they have *lost* a case.

The notion that liability for fees would be tied to liability on the merits is hardly a radical one. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), a case challenging rules against lawyer advertising, this Court vacated an award of attorney's fees against the state supreme court responsible for promulgating the rules. In so doing, it relied expressly on the fact that the defendant court had absolute immunity for the legislative act of promulgating the rules, and thus could not be held liable even prospectively on that basis. *Id.* at 737-39. The Court saw no indication that "Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." *Id.* at 738.

This link between merits liability and liability for fees under section 1988 was reaffirmed only last Term in *Pulliam v. Allen*, —— U.S. ——, 104 S. Ct. 1970 (1984). There, the Court faced the question whether fees could be assessed under section 1988 against a defendant judge charged with a civil rights violation. Again, the Court viewed this issue as essentially dependent on the "more fundamental question . . . whether a judicial officer acting in her judicial capacity should be immune from prospective injunctive relief" on the merits. *Id.* at 1974. Having found that the judge enjoyed no such immunity, the Court concluded that she could also be held liable for fees under section 1988.

These principles do not vanish, as the court of appeals seemed to believe, merely because *another* party has been found liable on the merits. In *Consumers Union*, for example, an injunction had been entered against the Virginia State Bar for enforcing the rule promulgated by the Supreme Court in its legislative capacity. The district court, noting that the Bar had urged the Supreme Court to modify the rules, had concluded that fairness required the imposition of a fee award on the Court and not the Bar. This Court disagreed, finding "no indica-

tion that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief." 446 U.S. at 739.

The proper inquiry in assessing the liability of a State or municipality for fees, therefore, is whether the particular governmental body is accountable for the underlying relief. The answer will depend on both the nature of the case and the nature of the defendants. Where a municipality is concerned, for example, a plaintiff may choose to sue either the municipality itself or one of its officials in his or her "official capacity." Regardless of the choice of defendant, however, the municipality is liable for merits relief only if the underlying civil rights violation was committed pursuant to an official policy. *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978) (damages); *Rizzo v. Goode*, 423 U.S. 362, 373-77 (1976) (injunctive relief). In any other case, a plaintiff may prevail only against the municipal employee responsible for the civil rights violation, and thus may only collect fees from that same party. *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Morrison v. Fox*, 660 F.2d 87, 88 (3d Cir. 1981); *Dean v. Gladney*, 621 F.2d 1331, 1337-38 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981).

Suits seeking relief payable from a state treasury are even more restricted because of the Eleventh Amendment. To begin with, no suits may be filed in federal court against a state in its own name; relief can only be sought in suits against state officials "in their official capacity." *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*). Even more importantly, the relief sought must be *prospective* in nature and based on a federal claim. *See Ex Parte Young*, 209 U.S. 123 (1908). Even though such a suit is, in substance if not in form, a suit against a state, this Court has recognized an exception to the Eleventh Amendment because of the need to have some mechanism to

"promote vindication of federal rights." *Pennhurst State School and Hospital v. Halderman*, —— U.S. ——, 104 S. Ct. 900, 910 (1984). In any other case, however, the state itself is not obligated to pay for the relief won in a suit against one of its officials, and should not be liable for the fee award either. *Glosen v. Barnes*, 724 F.2d 1418, 1421 (9th Cir. 1984).

The problem with the decision below was its failure to focus on the nature of the case before it and on the issue of who was responsible for the relief on the merits. This is a pure damages case against state officials. It is not, therefore, a case in which, under any theory, the state could be responsible to pay for the court's decree. On the contrary, as we have noted, it is simply impermissible for a plaintiff in federal court to sue a state for damages *or* to sue the state's officials "in their official capacity"[4] or in any other manner that would imply an obligation to pay "retroactive" relief. *E.g., Edelman v. Jordan*, 415 U.S. 651, 663-65 (1974). The only way to sue a state official for damages under section 1983 is to sue him *as an individual.* The wrong being redressed may be constitutional in nature because of the official position held by the defendant, but it is nevertheless a wrong for which the official, and not the state, is solely responsible.[5]

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[4] *Cf. Brandon v. Holt*, 105 S. Ct. 873, 878 (1985) (suit against city official "in his official capacity" is equivalent to suit against city).

Here, the district court seemed to rely on the fact that one of the defendants was the "highest ranking" state police officer, and that all of the defendants acted "in their official capacities." Pet. App. 6a-7a. The plaintiffs, for their part, sought to name Commissioner Brandenburgh as a defendant both in his individual *and official* capacities. None of these facts, however, alters the nature of the lawsuit, which was brought against individual state employees for damages only.

[5] If a defendant official is following a state policy, there will be a basis for injunctive relief against him in his official capacity. In

Nothing in the language of section 1988 or in its legislative history supports the idea that a state treasury may be reached to pay attorney's fees in a suit for damages against an individual official. Section 1988 provides that in cases under section 1983 and certain other civil rights statutes, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs.*" (Emphasis added.) Although section 1988 does not define the parties to be held responsible for the "costs," the logical place to look, at least where the plaintiff is the "prevailing party," is to the defendants responsible for the relief itself. "Costs," after all, are generally awarded "against the losing party and as an incident of the judgment." [6] The term itself, therefore, suggests that the party paying for the merits relief and the party paying fees should be one and the same.

The legislative history, though sparse, follows the same track. While Congress did express an intent to allow fee awards payable out of state treasuries, it viewed such awards as "ancillary" to suits "securing compliance" with federal civil rights laws.[7] This phrasing seems a clear reference to the *injunctive* suits by "private attorneys general" that were at the heart of the concerns leading to section 1988.[8] *See also, Edelman v. Jordan, supra,* 415 U.S. at 668 (an "ancillary effect" on the state treasury is permissible under the Eleventh Amendment in

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such a case, if the plaintiff nevertheless seeks only damages, the presence of an illegal state policy cannot alter the fundamental nature of the damages claim; it remains one asserted against the defendant official only in his individual capacity.

[6] *Moore's Federal Practice* ¶ 54.70 [1], at 1301. *See also* Fed. R. Civ. P. 54(d).

[7] S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5913.

[8] *See id.* at 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5910.

injunctive cases). Such suits, of course, are ones in which the state *is* liable to pay for the merits relief.[9]

The decision below, therefore, rests solely on a reading of the decision in *Hutto v. Finney, supra,* a case that, far from overturning the distinction between suits for damages and suits for injunctive relief, gave special emphasis to that distinction. The issue in *Hutto* was the availability of fee awards under section 1988 in cases in which state officials are sued for injunctive relief in their "official capacity." The case involved conditions in the Arkansas prison system, which were found to require federal judicial intervention. The named defendants were the State Commissioner of Corrections and members of the state Board of Corrections. Claims for damages were not at issue.

All that *Hutto* held was that, in such cases, the losing defendant (the state official sued in his official capacity) not only may be held responsible for correcting the constitutional violation, he may also be subjected to a fee award under section 1988. As the Court put it:

> Congress undoubtedly intended to . . . authorize fee awards payable by the states *when their officials are sued in their official capacity.* The Act . . . contains no hint of an exception for states defending injunction actions. . . .

437 U.S. at 693-94. In so holding, the Court relied on the recognition that "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself." 437 U.S. at 700. Because of this reality, the Court held, it was Congress's intent that the fee award also be paid by the same losing party —the State or (more accurately) its employee in his offi-

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[9] Congress also intended to authorize fee awards in *damages* cases—*i.e.*, cases where *states* are immune from liability. H. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976). But it gave no indication that such fee awards should be imposed on someone other than the person liable for the damages—the individual defendant.

cial capacity. *Id.* In short, nothing in *Hutto* undercuts the principle that a "state" must be properly responsible for the merits relief before it may be saddled with a fee award under section 1988. That is exactly what happend in that case.

By misapplying *Hutto* to a pure damages case, the decision below threatens to open up a whole new area of potential state and municipal liability. After all, the number of cases allowing injunctive relief against a state or city is far smaller than the number of cases in which individual officials face liability in damages. The facts of this case alone—involving alleged police brutality during a house search—should make that clear. Congress plainly did not intend, regardless of any immunity from damages themselves, that taxpayers be held responsible for attorney's fees in every such case. On the contrary, it intended that fees be the responsibility of the losing party—the party responsible for the merits relief. In a section 1983 damages case against an individual official, that party is the official himself.

II. ANY DOUBT ABOUT THE PROPER STATUTORY INTERPRETATION MUST, IN LIGHT OF THE ELEVENTH AMENDMENT, BE RESOLVED IN FAVOR OF THE STATE.

Even if section 1988 could be read to authorize fee awards against governmental bodies in some circumstances where they are not liable for the merits relief itself, it could not be read to authorize such awards against *state* governments. Any such authorization would constitute a congressional abrogation of their Eleventh Amendment immunity from suit.[10] Under well-established case law, section 1988 falls far short of the kind of legislative expression that would be required to find such an abrogation.

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[10] Congress has the power to abrogate the Eleventh Amendment in order to protect rights embodied in the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

The Court has made it clear that when Congress wants to abrogate the Eleventh Amendment, it must do so "explicitly and by clear language." *Quern v. Jordan, supra*, 440 U.S. at 345; *see also Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 284 (1973). The Court will not find an abrogation in general statutory language, like that in section 1988, which does not refer specifically to state liability.

Nothing in *Hutto v. Finney, supra*, altered these clear principles. There, as we have noted, this Court concluded that Congress had authorized fee awards against states in cases involving prospective relief. In so concluding, the Court devoted considerable attention to the issue whether section 1988—in authorizing fee awards against all losing defendants—was sufficiently clear to abrogate the state's Eleventh Amendment immunity in such cases. The majority held that, where the fees are ancillary to injunctive actions against states that are not barred by the Eleventh Amendment, there is no need for a specific, express abrogation of the states' immunity from fee awards. 437 U.S. at 694-98.

At the same time, however, the Court made it clear that a very different standard would apply to any statute alleged to abrogate state immunity in cases involving "retroactive" relief. The state defendants in *Hutto* directed the Court's attention to the cases holding that waivers of state sovereign immunity require "an extraordinarily explicit statutory mandate." *Id.* at 695. Rather than rejecting these cases, the Court distinguished them on the ground that they concerned "retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking *only prospective relief.*" *Id.* (emphasis added). Then, in a footnote, the Court made even clearer the kind of case in which it believed Congress had authorized a fee award against a state: "An award of costs will almost invariably be incidental to an award of prospective relief, for costs are generally

awarded only to prevailing parties . . . and only prospective relief can be pursued by an individual in a suit against a State." *Id.* at 695 n.24 (citation omitted).[11]

There could be no better indication that *Hutto* created only a limited exception to the general rule that congressional abrogations of the Eleventh Amendment must be clearly and specifically expressed. Indeed, in *Quern v. Jordan*, *supra*, this Court expressly adopted the reading of *Hutto* set out here. The Court distinguished *Hutto* in these terms:

> While *Hutto* [unlike *Fitzpatrick v. Bitzer*, *supra*, and *Employees v. Department of Public Health and Welfare*, *supra*] did not require an express statutory waiver of the state's immunity . . . the Court was careful to emphasize that it was concerned only with expenses incurred in litigation seeking *prospective relief* while the other cases involved retroactive liability for prelitigation conduct.

Id. at 344 n.16 (emphasis added).[12]

The Court below simply ignored these limitations on the *Hutto* rule by imposing fee liability in a very different category of cases—those involving the unauthorized torts of individual state officials, where damages are the only relief sought. If, instead, the Sixth Circuit had applied the correct standard, and sought an explicit mandate in section 1988 for a fee award against the state in this case, its ruling would necessarily have gone the other way. As we have discussed, there is no basis for con-

[11] Respondent, Opp. to Cert. at 10-11, and the trial court, Pet. App. at 5a, cite *Hutto* for the proposition that attorneys fees, as an element of "costs," do not fall within the shield of the Eleventh Amendment where States are parties in litigation. But in view of the Court's exclusive focus on injunctive cases, this broad proposition is insupportable. In any event, one could not use a "costs" theory to impose fee awards on third parties—like the state here—which were not even involved in the underlying litigation.

[12] *See also Pennhurst*, *supra*, 104 S. Ct. at 907 (citing *Quern*).

cluding that section 1988 authorizes a fee award against a state in a case where the only defendant is a state employee held liable in his individual capacity. On the contrary, every factor arguing in favor of a fee award in *Hutto* argues against a fee award in the present case. Where a state is liable on the merits, there is a basis for imposing a fee award. The same is just not the case here. In sum, far from explicitly abrogating the Eleventh Amendment for cases like this one, Congress evidenced no intent whatever to do so.

III. IT WOULD BE INDEFENSIBLE AS A MATTER OF POLICY TO IMPOSE FEE AWARDS ON STATES IN CASES LIKE THIS ONE.

In the view of amici, a decision authorizing fees in the present circumstances would impose unreasonable burdens on states and other governmental entities, while at the same time leading to significant overcompensation of plaintiffs.

First, the decision below, by imposing fee liability on the state, implicitly held that all constitutional torts are wrongs committed by the government, which require redress in the *public* interest. Such a stance contrasts sharply with the recognition, by several other courts, that in damages suits the "private attorney general" rationale for fee-shifting is far less apt because the wrong at issue is likely to be one-time and "essentially private" in nature. *Zarcone v. Perry*, 581 F.2d 1039, 1044-45 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *see Buxton v. Patel*, 595 F.2d 1182, 1184-85 (9th Cir. 1979).[13] These courts call for selectivity in the imposition of a fee award from anyone in a damages case.

The Sixth Circuit, however, in its rush to equate every police brutality case with a prison-reform case like *Hutto*,

[13] At the same time, the availability of damages may in itself provide sufficient incentive for the bringing of such cases. *Zarcone*, *supra*, at 1044-45; *Buxton*, *supra*, at 1184-85.

left little room for any such selectivity. The result of such a stance may well be virtually automatic fee-shifting even in those damages cases that, in reality, are little more than glorified tort suits. Particularly in view of the recent explosion of cases brought under section 1983,[14] this is hardly a welcome prospect.

More importantly, by shifting the fee obligation to the state rather than the individual defendant, the court below created the potential for abuse of section 1988 through settlements. This potential results from what must be considered the most peculiar aspect of the decision below—the fact that the state is being asked to pay fees for a case in which it played no significant role. The danger is that many other cases will repeat the pattern of this one. Here, the individual defendants (the only ones left in the case after the state was dismissed) settled by agreeing to pay certain amounts in damages while receiving a waiver of any fee claim as against them. Under the ruling below, this left the state liable for all of the fees at issue.

As long as the Sixth Circuit's rule is in place, the same risk will be present in nearly every settlement, because of two facts. First, an individual defendant has no interest in whether the amount he agrees to pay is labelled "damages" or "fees." The plaintiff, however, knows that every dollar in the settlement labelled "fees" will reduce the amount potentially available later from the state. As a result, he will ask that all recoveries from individual defendants be labelled "damages." The defendant, who has no interest in the issue, has little incentive to disagree.[15]

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[14] *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring in the result).

[15] Under any view, of course, a losing individual defendant is liable for fees under section 1988. In order to win a waiver of this element of liability in a settlement, the defendant generally will be required to pay a premium in the form of damages exceeding the amount that fairly reflects the plaintiff's actual injury.

Later, when the plaintiff wins "commensurate" fees from the state, his total recovery is likely to be greater than it would ever have been if there had been a single defendant responsible for all damages and fees. Essentially, there will be a double recovery of fees—once hidden in the amount paid in the settlement with the individual defendant, and once in the open in the order against the state.[16]

Obviously, it is very unfair to leave states potentially exposed to such excessive awards after the settlement of cases in which they play no role whatsoever. The only solution is to leave the responsibility for damages *and* fees where Congress intended it to be—with the individual defendant. States may choose to reimburse their employees in such cases, either routinely or on a case-by-case basis, but it would be intolerable to leave them with an open-ended obligation to pay the fees incurred in every constitutional damages suit between an employee and a citizen.

CONCLUSION

For these reasons, the decision below should be reversed.

Respectfully submitted,

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[16] Indeed, because the "hidden" fee element in the damages settlement will magnify the plaintiff's apparent recovery "on the merits," the amount of fees paid *by the state alone* may well exceed what would be justified by the actual strength of the plaintiff's case. *Cf. Hensley v. Eckerhart*, —— U.S. ——, 103 S. Ct. 1933 (1983) (fee award should reflect degree of plaintiff's success on the merits).